

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROY DWAYNE HOWARD,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

No. C 04-4637 CW  
CR 00-40210 CW

No. C 04-4639 CW  
CR 02-40062 CW

ORDER DENYING  
§ 2255 MOTION

Movant Roy Dwayne Howard, a federal prisoner incarcerated at the Federal Correctional Complex, Adelanto, California, filed a document titled, "Petition to Vacate Order of Restitution," which the Court construed as a motion under 28 U.S.C. § 2255, to vacate, set aside, or correct his sentence.

Respondent the United States of America opposes the motion, first, because the petition fails to state a cognizable claim under § 2255 and, second, because the petition is untimely. Having considered all of the papers filed by the parties, the Court DENIES Howard's motion to vacate, set aside, or correct his sentence.

BACKGROUND

On August 5, 2002, Howard plead guilty to armed bank robbery

1 charged in two consolidated criminal cases, CR 00-40210 CW and CR  
2 02-40062 CW. Howard was sentenced to one hundred fifty-one months  
3 imprisonment and five years supervised release. Howard was also  
4 ordered to pay a \$300 special assessment and restitution of  
5 \$259,758.30: "Payment of the special assessment and restitution is  
6 due immediately. Payment shall be made through the defendant's  
7 participation in the Bureau of Prisons' Inmate Financial  
8 Responsibility Program . . . [P]ayment of criminal monetary  
9 penalties shall be due during the period of imprisonment."  
10 Judgment, Case Numbers CR-00-40210-01 CW; CR-02-40062-01 CW.

#### 11 DISCUSSION

##### 12 I. Howard's § 2255 Motion

13 Pursuant to 28 U.S.C. § 2255, Howard moves to vacate the order  
14 of restitution. Howard claims, first, that the Court lacked  
15 sufficient evidentiary basis to conclude that he was able to pay the  
16 restitution immediately, and second, that the Court improperly  
17 delegated to the Bureau of Prisons the responsibility for devising a  
18 schedule for his restitution payments while he is incarcerated.

##### 19 A. Legal Standard

20 A prisoner in custody under a federal court sentence may  
21 collaterally attack the validity of his sentence by moving to  
22 vacate, set aside or correct the sentence pursuant to 28 U.S.C.  
23 § 2255. Tripati v. Henman, 843 F.2d 1160, 1162 (9th Cir. 1988). A  
24 court will grant a § 2255 motion (1) if the criminal court did not  
25 have jurisdiction; (2) if the sentence was not authorized by law or  
26 was otherwise illegal; or (3) if the defendant's constitutional  
27 rights were violated so as to render the judgment subject to

1 collateral attack. 28 U.S.C. § 2255; see generally United States v.  
2 Addonizio, 442 U.S. 178, 185 (1979); United States v. McAdams, 759  
3 F.2d 1407, 1409 (9th Cir. 1985) ("Although attacks under § 2255 may  
4 succeed where an error of less than constitutional dimension occurs,  
5 the cases require a 'fundamental defect which inherently results in  
6 a complete miscarriage of justice'").

7 B. Applicability of § 2255

8 1. Timeliness

9 Section 2255 provides that federal prisoners have one year from  
10 "the date on which the judgment of conviction is final" to file a  
11 motion for collateral relief:

12 A 1-year period of limitation shall  
13 apply to a motion under this section.  
14 The limitation period shall run from  
15 the latest of--

16 (1) the date on which the judgment of  
17 conviction becomes final;

18 (2) the date on which the impediment  
19 to making a motion created by  
20 governmental action in violation of  
21 the Constitution or laws of the United  
22 States is removed, if the movant was  
23 prevented from making a motion by such  
24 governmental action;

(3) the date on which the right  
asserted was initially recognized by  
the Supreme Court, if that right has  
been newly recognized by the Supreme  
Court and made retroactively  
applicable to cases on collateral  
review; or

(4) the date on which the facts  
supporting the claim or claims  
presented could have been discovered  
through the exercise of due diligence.

28 U.S.C. § 2255.

Howard was sentenced on August 5, 2002. Judgment was entered  
on August 12, 2002. The § 2255 petition was filed on October 25,

2004, which is outside of the statute of limitations. Howard does not state a basis for extending the filing date. Therefore, Howard's § 2255 petition is untimely and must be denied on this basis.

2. Requirement of Claiming a Right to Release from Custody

For a claim under 28 U.S.C. § 2255 to be valid, a defendant must be in custody and must claim the right to be released from custody. United States v. Kramer, 195 F.3d 1129, 1130 (9th Cir. 1999); United States v. Thiele, 314 F.3d 399, 401-02 (9th Cir. 2002). Howard petitions the Court only because he contests the manner in which he was ordered to pay restitution, not to seek release from custody. Thus, the § 2255 motion must be denied on this basis. Even if the motion did not suffer from these defects, it would be denied on the merits, as discussed below.

C. Imposition of Restitution Without Express Finding of Petitioner's Ability to Pay

The Victim and Witness Protection Act (VWPA), 18 U.S.C. §§ 3663-3664, gives courts "the ability to order restitution and 'grants the district court broad discretion in the kind and amount of evidence required' to order restitution." United States v. Zink, 107 F.3d 716, 719-20 (9th Cir. 1997)(quoting United States v. Ramilo, 986 F.2d 333, 335 (9th Cir. 1993)). Although the VWPA does not prohibit a court from imposing restitution on an indigent defendant, "the record must reflect some evidence [that] the defendant may be able to pay restitution in the amount ordered in the future." Ramilo, 986 F.2d at 336.

However, if the defendant consents in a plea agreement to pay

1 restitution in a specified amount, the district court is relieved of  
2 any independent obligation to determine whether the defendant will  
3 be able to pay such restitution. Zink, 107 F.3d at 719. In Zink,  
4 the court held that the sentencing court need not inquire into the  
5 indigent defendant's ability to pay \$5,800,000 in restitution  
6 because defendant agreed to such restitution in his plea agreement:  
7 "Although it is questionable whether the record suggests that Zink  
8 may be able to pay the amount of restitution ordered, Zink's clear  
9 acquiescence in the restitution order relieved the district court of  
10 any independent obligation to further determine Zink's ability to  
11 pay restitution." Id. The court upheld the restitution agreement  
12 even though the probation report said Zink had no assets. Id.

13 In the present case, Howard plead guilty to armed robbery in  
14 violation of 18 U.S.C. §§ 2113(a) and (d), the penalties of which  
15 include restitution. Howard signed his plea agreement, which  
16 stated: "I agree that the court may order and I will pay restitution  
17 in the amount of \$263,818." Howard Plea Agreement at 2, 5. As in  
18 Zink, Howard's probation report indicates that his ability to pay is  
19 questionable. Presentence Investigation Report, August 14, 2001,  
20 at 19.

21 Under Zink, the order of restitution is valid despite Howard's  
22 questionable financial circumstances because his plea agreement  
23 included restitution in the amount the Court ordered him to pay.

#### 24 D. Delegation of Scheduling of Restitution Payments

25 Howard relies on a series of cases from the Second and Fourth  
26 Circuits which hold that the sentencing court may not delegate to  
27 the Bureau of Prisons the responsibility to devise a schedule for  
28

1 restitution payments. See e.g., United States v. Mortimer, 94 F.3d  
2 89, 91 (2d Cir. 1996); United States v. Kassir, 47 F.3d 562, 568 (2d  
3 Cir. 1995); United States v. Miller, 77 F.3d 71, 78 (4th Cir. 1996).

4 The Ninth Circuit has rejected the position taken by those  
5 circuits, holding that sentencing courts may delegate the  
6 determination of the timing and manner of restitution payments to  
7 the Bureau of Prisons. Montano-Figueroa v. Crabtree, 162 F.3d 548,  
8 550 (9th Cir. 1998). In Montano-Figueroa, the Ninth Circuit  
9 specifically upheld the sentencing judge's delegation of the  
10 management of restitution payments to the Bureau of Prisons through  
11 its Inmate Financial Responsibility Program (IFRP). Id.; see also  
12 United States v. Barany, 884 F.2d 1255, 1259-61 (9th Cir. 1989),  
13 cert. denied, 493 U.S. 1034 (1990).

14 Howard was ordered by this Court to participate in the IFRP in  
15 order to pay his special assessment and restitution. Under Montano-  
16 Figueroa, this delegation is permissible.

17 CONCLUSION

18 For the foregoing reasons, the Court DENIES Howard's § 2255  
19 motion. The clerk shall close the file.

20 IT IS SO ORDERED.

21  
22 Dated: 2/28/06



23  
24 CLAUDIA WILKEN  
25 United States District Judge

26 Copies mailed to counsel  
27 as noted on the following page